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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Amendment of Rules and	)	CS Docket No. 97-98
Policies Governing Pole	)	
Attachments	)	

REPLY COMMENTS OF
TELE-COMMUNICATIONS, INC.

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Tele-Communications, Inc. ("TCI") hereby submits its reply comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

The record evidence before the Commission supports TCI's position that rates for attachments to utility poles, ducts, conduits, and rights-of-way under Section 224 should be calculated on a cost-basis. By contrast, the utilities advocate, inter alia, replacement costs as the basis for valuing plant, higher pole height presumptions, and the allocation of safety space costs to attaching parties. These measures are designed to allow the electric utilities to extract maximum monopoly rents from their essential facilities. In order to prevent the predictable damage to consumer welfare and the cable television and telecommunications industries that the electric utility proposals would impose, the Commission, consistent with sound economic policy, should adopt the following principles:

- Pole attachment rates should be calculated on a cost basis;

- The utilities' uneconomic rate adjustment proposals designed to price fully allocated plant on a replacement cost basis should be rejected;

- Thirty-foot poles should remain in the rate base in light of their continued substantial use in the industry; and

- The costs of electric safety space should not be allocated to attaching entities.

If adopted, these proposals, as well as those contained in TCI's initial comments, will allow utilities to recover the costs imposed upon them by attaching entities while avoiding the uneconomic allocations that result in anticompetitive harms.

II. A COST-BASED METHOD OF CALCULATING AND ASSESSING POLE ATTACHMENT RATES IS ESSENTIAL TO RATIONAL OPERATION OF THE TELECOMMUNICATIONS AND CABLE INDUSTRIES.

It is critical that the Commission utilize a cost-based method for devising pole attachment rate calculations. As TCI demonstrated in its initial comments, a cost-based theory provides adequate compensation to the utility while preventing the utility from extracting monopoly rents for access to its bottleneck facilities. Diversion from a cost-based method will impose the costs of monopoly rents on competitive entities, skewing rational entry choices and depriving consumers of the lower priced services that competition otherwise promises.[1] It

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[1] The Cable Services Bureau recently issued a Declaratory Ruling prohibiting certain anticompetitive provisions placed in pole attachment agreements by utilities. Commenting on the decision, Meredith Jones, the Cable Services Bureau Chief, stated that "[u]nreasonable pole attachment rates and unreasonable conditions in pole attachment contracts can

is imperative that the Commission continue to require the assessment of pole attachment rates on the economically sound basis of costs.

Despite their monopoly control of poles and conduit, the electric utilities seek to justify rate increase proposals on the basis of benefits accruing to attaching parties as opposed to the costs involved in providing access. For example, the White Paper Utilities[2] advocate inclusion of a portion of General and Intangible Plant in the calculation of the cost of a bare pole because the "FCC's current formula excludes a portion of electric utility plant that directly and/or indirectly benefits attachers."[3] Moreover, they assert that

> [i]f a pole or conduit rate is based on historical costs that are significantly below replacement costs, the rate will fall far short of the competitive market equivalent price. As a result, the good or service is not allocated to those who value it the highest, but rather to the first entity in line for the favorable rate.[4]

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only hold back the availability of emerging telecommunications services to consumers. With this order we are removing another barrier to fair competition." *Cable Services Bureau Adopts Declaratory Ruling Regarding Pole Attachment Rates and Conditions, Public Notice*, Report No. CS 97-19 (rel. July 21, 1997).

2 The association consists of the American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Florida Power and Light Company and Northern States Power Company ("White Paper Utilities").

3 White Paper Utilities Comments at 62 (emphasis added).

4 Id. at 30 (emphasis added).

These assertions erroneously assume a competitive market for poles and conduit. Moreover, they misapprehend the notion of cost-based essential facility pricing. The allocation of an essential facility to those who value it the highest, advocated by the White Paper Utilities, is simply another way of describing the extraction of monopoly rents. This is an unacceptable basis for pricing.

As TCI demonstrated in its comments, the essential nature of bottleneck facilities results in very high "benefits" from their use since competitive viability is dependent upon access to the bottleneck facilities. As an economic matter, an attaching party would pay access rates to the point of loss, for without access to the bottleneck facility, the attaching party would have no alternative means by which to offer its services. In short, the benefits emphasis advocated by the utilities, if taken to its theoretical conclusion, would permit a rational non-competing utility to charge access rates at a level that absorbs up to the last unit of profits of the attaching entities -- enough to justify the attacher's continued operation (and the continuation of a revenue flow to the utility for attachment) while extracting the maximum rents. A utility competing in the telecommunications or cable services market would have the more unwholesome incentive and ability to extract rents from competitors at a level that would drive competitors out of the market entirely.

In part because a benefits theory preserves monopoly pricing and behavior, the cost-based method must prevail.[5]

The White Paper Utilities seek to avoid cost-based essential facility pricing through claims that electric utility poles and conduit are not essential facilities for the cable and telecommunications industries.[6] The electric utilities base this somewhat astounding assertion on the premise that the core business of electric utilities is not in competition with cable operators or telecommunications carriers.[7] They state that the essential facilities doctrine applies only when a monopolist refuses a competitor access to a facility which cannot be duplicated and which is essential to competition in the relevant market.[8] The White Paper Utilities claim that a lack of core business overlap between electric utilities on one hand and cable

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5 The cost-based method of calculating pole attachment rates compels a rejection of the proposal advanced by several utilities to assess fees for overlashed cables. See White Paper Utilities Comments at 73; see also Edison Electric Institute and UTC Comments at 36. Overlashing obviates the need for capacity expansion on a pole and thereby reduces attachment costs imposed upon the utility. The proposal to assess overlashing fees is a revenue-enhancement device rather than a cost recovery mechanism. As for safety concerns, the overlasher shares the incentive of the utility to maintain the continued operation of the pole and its attachments. Any concerns that the pressures placed on the pole by overlashing endanger its continued operation can and should be addressed and resolved between the attacher and the utility pole owner in accordance with the unique safety concerns posed.

6 See White Paper Utilities Comments at 34-42.

7 See id. at 34.

8 See id. at 35.

operators and telecommunications carriers on the other results in the absence of a competitive relationship. This absence, they argue, renders the essential facilities doctrine inapplicable to electric utility poles and conduit.[9]

The "relevant market" analysis of the White Paper Utilities is flawed. The language of Section 224(a)(1) itself provides the definition of the relevant market: the ownership or control of poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. The near absolute control exerted by utilities over this market led Congress to open the bottleneck through Section 224.[10] The White Paper Utilities' disagreement over the definition of the relevant market, specifically, and the application of the essential facilities doctrine, generally, is more appropriately directed at the statute, not with the Commission's interpretation and application.

In addition to their misidentification of the relevant market, the White Paper Utilities ignore the competition arising out of the growing electric utility entry into the telecommunications and video services markets. The comments of the National Cable Television Association extensively recount the electric utility actual or planned entry into telecommunications

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[9] See id. at 36.

[10] As TCI noted in its initial comments, the Commission, too, has many times recognized the bottleneck quality of poles, ducts, conduit, and rights-of-way. See TCI Comments at n.5 and n.18.

and video markets.[11] Not only are electric utilities becoming competitors in the telecommunications and video services markets, but they also hold a monopoly on distribution facilities which cannot be duplicated. Even under their flawed analysis of the essential facilities doctrine's applicability, the record evidence of growing competition between electric utilities and cable operators or telecommunications carriers renders their position invalid.

III. THE COMMISSION SHOULD REJECT ELECTRIC UTILITY REQUESTS TO ESTABLISH THE MAXIMUM POLE ATTACHMENT RATE BASED UPON A FORMULA WHICH SUBSTITUTES REPLACEMENT COSTS IN THE FULLY ALLOCATED COST FORMULA.

Several electric utilities have requested that the Commission use "forward-looking economic costs" in place of the current fully allocated cost standard to establish the maximum pole attachment rate.[12] In the Local Competition proceeding, the Commission used the term "forward-looking long-run economic cost" to describe the total element long run incremental cost of providing unbundled telecommunications.[13] TCI has consistently supported the use of forward-looking economic costs as a basis

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11 See NCTA Comments at n.25.

12 See Duquesne Light Company Comments at 11; Edison Electric Institute and UTC Comments at 15; Union Electric Company Comments at 19; and White Paper Utility Comments at 23.

13 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 672 (1996), vacated in part by Iowa Utilities Bd. v. F.C.C., No. 96-3406 (8th Cir. July 18, 1997).

for pricing.[14] In the instant proceeding, the electric utilities misuse the term and request the Commission to adopt rates based upon their unique definition of "forward-looking cost." Although the electric utilities describe their proposal in appealing terminology, their actual request is inconsistent with the long run incremental cost standard adopted by the Commission in the Local Competition proceeding. The Commission should dismiss the electric utilities' deceptively named "forward looking cost" proposals, which comprise attempts to raise, rather than lower, the ceiling established by the current fully allocated cost formula.

A maximum rate based on electric utility definitions of "forward-looking cost" would exceed both incremental and fully allocated costs. For example, the White Paper Utilities claim that a "forward-looking cost" should be calculated by replacing the embedded cost of poles or conduit in the existing fully allocated cost formula with the "forward-looking economic cost of a pole/conduit system."[15] Their proposal does not involve measurements of the increase in pole costs caused by the attaching party. Rather, the White Paper Utilities seek Commission permission to price fully allocated pole investment at replacement cost prices. This strained hybrid formula would

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14 See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Comments of Tele-Communications, Inc.* at 28 (filed May 16, 1996).

15 White Paper Utilities Comments at 44.

result in pole attachment rates that are based on an assumption that attaching parties cause the immediate replacement of all existing poles and conduit. Such a rate would not only exceed the incremental cost boundary at the lower end of the Commission's zone of reasonableness, but it would exceed the upper fully allocated cost boundary, as well.[16]

When attaching parties request capacity expansions, existing rules provide for the attaching parties to compensate the utility for the added investment costs at current prices. Hence, the attaching parties already bear the additional costs of upgraded facilities at replacement cost prices through payment of modification or make-ready charges. Moreover, through application of the pole attachment rate formula, attaching parties must pay for the costs of existing poles and conduit facilities which are not incremental to the attachment request. Current pricing rules already permit the utilities to charge attaching parties for the cost of additional facilities at current prices as well as a share of the embedded costs (costs not imposed by attaching parties). It would be grossly unfair and contrary to the purpose of Section 224 to re-price the embedded non-incremental investment component of the fully allocated rate to reflect phantom costs that attaching parties do

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[16] Congress and the Commission have determined that the zone of reasonableness for pole attachment rates is bounded on the lower end by incremental cost and on the upper end by fully allocated costs. See 47 U.S.C. § 224(d)(1); see also Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, *Notice of Proposed Rulemaking*, FCC 97-94 at ¶ 2 (rel. March 14, 1997)("Notice").

not cause and utilities do not incur. The Commission must reject the electric utilities' proposed modifications to the pole attachment rate calculations.

IV. THIRTY-FOOT POLES SHOULD REMAIN IN THE RATE BASE.

The vast majority of commenters favor the retention of 30-foot poles in the rate base.[17] The cable industry and telecommunications carriers (including pole owners such as the BOCs and GTE) were unanimous in their opposition to the removal of 30-foot poles from the calculus. In fact, even an electric utility, Consolidated Edison, recommended retention of the current pole height presumptions, observing that "[t]he Commission's rules allow individual utilities sufficient flexibility to propose variances from these presumptions based on their particular circumstances."[18] The Commission must retain 30-foot poles as a matter of fact based on the evidence in the record. The cable industry and telecommunications carriers offer substantial evidence of 30-foot pole use by utilities.[19] There is no legitimate basis to exclude from the rate base a class of poles upon which so many attachers currently have attachments.

Moreover, the Commission should retain 30-foot poles in the rate base as a matter of policy designed to discourage electric

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17 See Bell Atlantic/NYNEX Comments at 10; GTE Comments at 13; MCI Comments at 13; NCTA Comments at 15-18; SBC Comments at 38; Sprint Comments at 3; Time Warner Comments at 10, 17; U S WEST Comments at 4; and USTA Comments at 27-29.

18 Consolidated Edison Company of New York Comments at 4.

19 See NCTA Comments at 15-18; GTE Comments at 14; Time Warner Comments at 9-10; and U S WEST Comments at Attachment 2.

utilities from burdening attaching parties with unrelated infrastructure improvement costs. As MCI observes, "[m]any utility companies are preparing for deregulation in their core business by upgrading to carry higher electrical voltage loads."[20] The attempt to establish higher presumptive pole heights is designed to recover the costs of providing electric service in their new environment from cable operators and telecommunications carriers. This proposition is untenable as a matter of economics and threatens to burden the cable and telecommunications industries with costs unrelated to their attachments. The Commission should reject electric utility attempts to increase costs for attaching parties in a manner at odds with both policy and record evidence. In pursuit of that goal, the Commission should retain 30-foot poles in the rate base.

V. ALLOCATION OF SAFETY SPACE TO ELECTRIC UTILITIES IS APPROPRIATE.

The utilities recommend allocation of the safety space to nonusable space. They claim that attaching parties should bear these costs because the safety space is designed to protect the employees of attaching parties from contact with high voltage electric facilities.[21] Moreover, they claim that not only was the Commission's decision to assign this space to utilities flawed initially, but also that the 1996 Act undermines that

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[20] MCI Comments at 4.

[21] See White Paper Utilities Comments at 51.

earlier analysis.[22] Therefore, the electric utilities contend, the safety space allocation policy should be changed.[23]

The Commission has already rejected exclusion of safety space from usable pole space and unequivocally determined that "no part of the safety space is to be considered usable pole space occupied by CATV."[24] The Commission's position remains valid. The utilities' proposal would reduce the amount of usable space in the pole formula, thereby increasing the rates that attaching parties would be obligated to pay. In effect, the proposal places the costs of the safety space on attaching parties.

TCI emphasizes in this proceeding the desirability of recovering costs from the cost causer. Safety space costs are not caused by attaching parties. The utilities fail to consider that safety space costs are incurred solely because of the presence of electric facilities on the pole (i.e., telephone company-owned poles without electric facilities are not subject to the safety space requirements). The responsibility of guarding against potential voltage hazards is a necessary public safety obligation inherent to the provision of electricity. A party's mere presence on a pole does not impose upon it the

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22 See id. at 51, 54; Duquesne Light Company Comments at 22.

23 See Union Electric Company Comments at 26.

24 Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, *Memorandum Opinion and Second Report and Order*, 72 FCC 2d 59 at ¶ 25 (1979) ("Second Report and Order").

obligation to assume the costs and responsibilities of providing electric power. It would be no more reasonable to assign electric safety space costs to attaching entities than it would be to require them to assume generation and transmission costs. The safety space cost is rightfully recovered by the party responsible for the high voltage lines and the attending safety requirements -- the electric utility.

Moreover, the safety space is, in fact, used rather substantially by the electric utilities. Several commenters note that safety space is used by electric utilities for the placement of street lights,[25] transformers,[26] vertical risers,[27] appurtenant equipment,[28] and even non-conductive telecommunications cables.[29] The categorization of this space as nonusable would be nonsensical. Previously, when faced with identical facts, the Commission determined that the safety space should not be excluded from the determination of usable space.[30] The Commission should retain its established, sound policy of requiring the electric utilities -- cost causers and users of the safety space -- to absorb its related costs.

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25 See, e.g., U S WEST Comments at n.13; NCTA Comments at 14; Electric Utilities Coalition at 38; White Paper Utilities at n. 127.

26 See Time Warner Comments at 15; AT&T Comments at 18.

27 See Edison Electric Institute and UTC Comments at 31.

28 See id.

29 See AT&T Comments at 19.

30 See Second Report and Order at ¶ 24.

VI. THE EIGHTH CIRCUIT'S DECISION CONFIRMS THE COMMISSION'S PRIMARY JURISDICTION OVER POLE ATTACHMENT RATES.

The Commission allowed an extension of time to file reply comments in order to allow parties an opportunity to assess the effect of the Eighth Circuit's recent decision[31] on this rulemaking.[32] Although the Eighth Circuit's decision vacated the Commission's local competition pricing rules,[33] it does not limit the Commission's authority to regulate rates, terms, and conditions for pole attachments under Section 224. In fact, the Eighth Circuit's decision is properly interpreted to reinforce the Commission's primary jurisdiction over pole attachment rates.

The Eighth Circuit's decision was premised upon a jurisdictional analysis under Section 2(b) and the plain meaning of Sections 251 and 252. Through its Section 2(b) analysis, the court observed that Congress had specifically exempted Section 332 from the scope of Section 2(b)'s limitation on the Commission's jurisdiction.[34] This observation led the court to conclude that the Commission's local competition pricing rules did not exceed its jurisdiction as they relate to CMRS providers.[35]

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31 Iowa Utilities Board v. F.C.C., No. 96-3321 (8th Circuit July 18, 1997).

32 Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, *Order*, DA 97-1583 (rel. July 25, 1997).

33 Iowa Utilities Board at 114.

34 Id. at n.21.

35 Id.

Even assuming arguendo that pole attachment rates are intrastate in nature, Iowa Utilities Board compels the conclusion that the Commission retains primary jurisdiction over their regulation. The Eighth Circuit noted that

> a federal statute's mere application to intrastate telecommunications matters is insufficient to confer intrastate jurisdiction upon the FCC; the statute must also directly grant the FCC such intrastate authority in order to overcome the operation of section 2(b).[36]

Like Section 332 (which the court recognized was exempted from Section 2(b)), Section 224 enjoys an express exemption from Section 2(b)'s applicability.[37] This exemption grants exclusive jurisdiction to the Commission over pole attachment rates, subject only to the proper certification by a State of its regulation of pole attachments pursuant to Section 224(c). Hence, if the Eighth Circuit's decision is perceived to have any effect on the instant proceeding, it confirms the Commission's plenary authority over the subject matter at issue.

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[36] Id. at 110.

[37] See 47 U.S.C. § 152(b) ("Except as provided in sections 223 through 227, inclusive, and section 332 . . . ").

VII. CONCLUSION

In conclusion, TCI urges the Commission to adopt policies and rate components to ensure the availability of just and reasonable rates for access to poles, ducts, conduits, and rights-of-way consistent with the recommendations contained herein and with those presented in TCI's initial comments.

Respectfully submitted,

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